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NO. 91-1729

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

****

UNITED STATES OF AMERICA, ET AL,
Petitioners

v.

STATE OF TEXAS, ET AL,
Respondents

****

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Executive Assistant Attorney General

JORGE VEGA, Chief
General Litigation Div.

EDWIN N. HORNE
Asst. Atty. Gen.
OF COUNSEL

JAMES C. TODD, Chief
Appellate Division
COUNSEL OF RECORD

QUESTIONS PRESENTED

Whether the Secretary of Agriculture's unilateral imposition of liability on a State for direct mail delivery losses under the Food Stamp Act is a contractual debt subject to prejudgment interest, or a penalty and not subject to prejudgment interest.

Whether the Fifth Circuit was correct in its determination that the Debt Collection Act abrogated prior common law permitting awards of prejudgment interest against the States.

Whether awarding prejudgment interest against the State of Texas would violate the principles of *Pennhurst State School & Hospital v. Halderman,* where the Food Stamp Act does not provide for prejudgment interest on discretionary penalties awarded against a State, and the Debt Collection Act expressly exempts the States from prejudgment interest.

Whether the Fifth Circuit was correct in its decision not to defer to the United States Department of Justice and the General Accounting Office in their interpretation of § 3701(c) of the Debt Collection Act.

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Debt Collection Act of 1982, Pub. L. No. 97-365, § 11, 96 Stat. 1755-1756, as amended, 31 U.S.C. §§ 3701(c), 3714, 3716, and 3717, the regulations promulgated thereunder, 4 C.R.F. 102.13(i), pertinent provisions of the Food Stamp Program, 7 U.S.C. § 2016(f), and the regulations promulgated thereunder, 7 C.F.R. §§ 276.1 and 276.2.

STATEMENT OF THE CASE

Respondents accept in general the factual description presented by Petitioner, with the following addendum concerning the Food Stamp Program, 7 U.S.C. §§ 2011 et seq.. The Food Stamp Program is a program administered

jointly by the Federal and State Governments in which state agencies (in Texas the Texas Department of Human Services) make eligibility determinations and authorize low-income households to obtain food stamp coupons. The coupons themselves are obligations of the Federal Government and are redeemable at face value by providers. The coupons are delivered to the State agency by the United States Department of Agriculture.

The Act provides that liability may be imposed upon the State by the Secretary for failure by the State to properly execute the administrative functions associated with eligibility determinations and distribution of coupons. In most cases such liability is contingent upon a finding by the secretary that the State was negligent or otherwise at fault. 7 U.S.C. § 2020(h). The statute has, however, long held States strictly liable for the "acceptance, storage and issuance" of the food stamp coupons. However, the original law provided that if the coupons were distributed to households through the U. S. Mail, the State's liability ended once the coupons were put into possession of the United States Postal Service. Accordingly, States adopted strict security measures with respect to the storage and transportation of the coupons while the coupons were in the custody and control of the State or its agents. None of the losses which resulted in State liability being challenged in this case resulted from losses which occurred while the coupons were in the custody and control of the State or any of its agents.

In 1981, the Food Stamp Act was amended permitting the Secretary to make States liable to some degree for mail issuance losses. 7 U.S.C. § 2016(f). The regulatory scheme adopted by the Secretary recognized that mail issuance losses were an exception to the strict liability applicable to other issuance activities. Nevertheless, the Secretary unilaterally

established a "tolerance level" for losses above which States would be held strictly liable without regard to any fault on the part of the State or its agents, nor would the State be permitted to demonstrate fault on the part of any third party. 7 C.F.R. § 276.2(b)(2)(4).

Understandably, following the adoption of interim rules on this subject, many States took issue with various aspects of the Secretary's regulations and recommended that State agencies not be held accountable for mail issuance losses directly related to Postal Service operations. 48 Fed. Reg. 15225. On April 9, 1986, the Department of Agriculture published proposed rules in which the Secretary clearly and unambiguously indicated that the Food and Nutrition Service would adjust claims for mail issuance losses where such relief was warranted. The criteria for determining when such relief would be warranted specifically made reference to a situation in which the State continued to issue food stamp coupons through the mail in order to aid an investigation by the U.S. Postal Service or other law enforcement agencies into heavy mail issuance losses. See 51 Fed. Reg. 12268, at 12275.

REASONS FOR DENYING THE WRIT
ARGUMENT

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE SECRETARY'S UNILATERAL IMPOSITION OF LIABILITY ON A STATE FOR DELIVERY LOSSES UNDER THE FOOD STAMP ACT IS NOT A CONTRACTUAL DEBT SUBJECT TO PREJUDGMENT INTEREST, BUT RATHER A PENALTY NOT SUBJECT TO PREJUDGMENT INTEREST.

The obligation of Texas to pay money to the United States is a result of a unilateral decision by the Secretary of Agriculture. The decision to impose strict liability for direct mail delivery losses above an arbitrary "tolerance level" in the U.S. Postal Service was unilateral and a complete reversal of prior law. *State of Texas v. United States*, 951 F.2d 645, 648-49 (5th Cir. 1992); *Gallegos v. Lyng*, 891 F.2d 788, 789 (10th Cir. 1992). There were no arm's length negotiations between the Secretary and the States. The imposition of the obligation to pay was purely discretionary with the Secretary and, as the court below held, is not subject to judicial review. If the obligation were a debt created by a contractual arrangement, judicial review of disputes arising from that contractual relationship would be required. Moreover, the imposition of strict liability for delivery losses over the tolerance level for use of the U.S. Postal Service was opposed by many States, including Texas. 51 Federal Register 12268. This liability operates as a penalty for losses due to the actions of third parties; it is punitive and meant to force the States to adopt alternate and much more costly distribution schemes for the

delivery of food stamps, and is not an effort to disgorge monies illegally diverted from the Food Stamp Act.

Accordingly, the "debt" on which the United States seeks to collect interest, pursuant to federal common law, is not a debt created by some contractual agreement requiring prejudgment interest for full and complete compensation for that debt. See *West Virginia*, 479 U.S. 305, 107 S.Ct. 702 (1987). Rather, it is a penalty, and as such is not subject to prejudgment interest. *Rodgers v. United States*, 332 U.S. 371, 374-76, 68 S.Ct. 5, 7-8 (1947).

To permit prejudgment interest on the unilateral imposition of a liability is an improper use of the spending power of Congress, and violates the contract doctrine enunciated in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981). Any condition or penalty on the grant of federal funds to the States must be made unambiguously to permit a knowing acceptance of the liability. See Section III., *infra*.

The inapplicability of prejudgment interest to a penalty or noncontractual debt is not a change in federal law. Because prejudgment interest is not available for this liability, it is unnecessary to reach the issue *infra* of whether Congress abrogated the common law in passing the Debt Collection Act, 31 U.S.C.A. § 3701 *et seq.*.[1]

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[1] The Circuit Courts are split on this issue.

II. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE FIFTH CIRCUIT WAS CORRECT IN ITS DETERMINATION THAT THE DEBT COLLECTION ACT ABROGATED ANY PRIOR COMMON LAW PERMITTING AWARDS OF PREJUDGMENT INTEREST AGAINST THE STATES.

The Food Stamp Act, 7 U.S.C. § 2001 *et seq.*, is silent as to the imposition of prejudgment interest on claims against the States.[2] The Debt Collection Act, 31 U.S.C. §3701 *et seq.*, expressly exempts the States from its provision imposing prejudgment interest on claims owed the Federal Government.[3] The Secretary maintains that the USDA is permitted nonetheless to impose prejudgment interest pursuant to federal common law. *West Virginia v. United States*, 479 U.S. 305, 107 S.Ct. 702 (1987). In particular, the Secretary maintains that the enactment of § 3701(c), which expressly exempts the States from prejudgment interest, did not expressly prohibit the imposition of prejudgment interest on the States, and therefore § 3701(c) did not abrogate prior

[2] Section 2022 was amended in November of 1990, subsequent to the judgment in the District Court, expressly providing for prejudgment interest for claims brought under the quality control provisions of § 2025 of the Food Stamp Act.

[3] Section 3701(c) provides: "In sections 3716 and 3717 of this title, 'person' does not include an agency of the United States Government, of a State government, or of a unit of general local government."

federal common law permitting such interest. In contrast, Respondent agrees with the Fifth Circuit that Congress expressly addressed the issue, thus abrogating the federal common law; Congress does not have to expressly and affirmatively act in order to abrogate federal common law. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 315, 101 S.Ct. 1784, 1791 (1981).

The focus of this dispute is the correct interpretation of § 3701(c) of the Debt Collection Act. The Fifth Circuit held that the intent of Congress was to exempt the States from prejudgment interest unless expressly authorized by statute. *State of Texas*, 951 F.2d at 651. *See also*, *Perales v. United States*, 751 F.2d 95 (2nd Cir. 1984) (per curiam), affirming, 598 F.Supp. 19 (S.D.N.Y. 1984); *Penn. Dept. of Public Welfare v. United States*, 781 F.2d 334 (3rd Cir. 1986); *Arkansas by Scott v. Block*, 825 F.2d 1254 (8th Cir. 1987). *But see*, *Gallegos v. Lyng*, 891 F.2d 95 (10th Cir. 1989); *County of St. Clair v. United States Dept. of Labor*, 754 F.2d 375 (6th Cir. 1984) (Table). Petitioner maintains that this express statutory exemption from prejudgment interest does not equate with an abrogation of the common law permitting prejudgment interest, that prohibiting the States from prejudgment interest is contrary to the purposes of the Debt Collection Act, and that finding an implied abrogation of common law is improper.

Any analysis of statutory construction necessarily begins with the language of the statute. *Bread Pol. Action Committee v. Fed. Elect. Comm.*, 455 U.S. 577, 580, 102 S.Ct. 1235, 1237-38 (1982). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.*, quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056 (1980). The language of § 3701(c) of the Debt

Collection Act exempts the agencies of the Federal Government, the States, and units of local government from the provisions of § 3716 (administrative offset) and § 3717 (interest and penalty on claims).

Petitioner argues that merely exempting the States from the provision providing for prejudgment interest does not mean that Congress meant to exempt the States from common law prejudgment interest; in other words, petitioner argues that an express exemption from a statutory provision providing for a remedy is not a clear abrogation from the common law rule providing for the same remedy.

Petitioner relies on *West Virginia v. United States*, 479 U.S. 305, 107 S.Ct. 702 (1987), for the proposition that the issue of statutory construction is not clear. The federal common law rules governing the imposition of prejudgment interest prior to the enactment of the Debt Collection Act were discussed by this Court in *West Virginia*, *supra*, and *Rodgers v. United States*, 332 U.S. 371, 68 S.Ct. 5 (1947). Under federal common law, prejudgment interest was granted or denied by a federal district court by looking to the Congressional purposes behind the obligation, "in the light of general principles deemed relevant by the Court." *Id.* at 373, 68 S.Ct. at 7. In *West Virginia* this Court expressly reserved judgment on whether the Debt Collection Act abrogated the common law regarding prejudgment interest remedies against the States. *Id.* at 312 n. 6, 107 S.Ct. at 707 n.6. The refusal to reach an analysis that would only be dictum in a case brought under a contract that pre-dated the Debt Collection Act does not mandate the conclusion, as petitioner suggests, that the plain meaning of the statute is less than clear.

Federal courts are not common law courts. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 313, 101 S.Ct. 1784, 1790 (1981); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822 (1938). The issue of whether a statute has abrogated or pre-empted the common law is a question of whether Congress "spoke directly to a question", and, contrary to the claims of petitioner, not whether "Congress had affirmatively proscribed the use of federal common law." *City of Milwaukee*, at 315, 101 S.Ct. at 1791; *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 101 S.Ct. 1571 (1981). "Federal common law is a 'necessary expedient,'...and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." *City of Milwaukee*, at 314, 101 S.Ct. at 1791; *Commonwealth of Penn. Dept. of Public Welfare v. U.S.*, 781 F.2d 334 (3rd Cir. 1986), *reh'g and reh'g en banc denied*.

In interpreting the Death on the High Seas Act,[4] for example, this Court stated that although the Act "does not address every issue of wrongful death law,...but when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 98 S.Ct. 2010, 2015 (1978). To supplement the Debt Collection Act with the imposition of a prejudgment interest charge on the basis of common law, when the statute expressly exempts the States from this same interest, makes the statutory exemption meaningless.

There can be little doubt that the Debt Collection Act is a comprehensive effort by Congress to improve the claim collection efforts of the Federal Government. Congress "spoke directly to a question" of prejudgment interest against

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[4] 46 U.S.C.A. §§ 761-67.

the States, and exempted them. Petitioner has provided no evidence or argument suggesting that the express exemption of the States from the provisions of §§ 3716 and 3717 indicates Congressional concern for the encouragement and preservation of "supplemental remedies." *Mobil Oil*, 436 U.S. at 625, 98 S.Ct. at 2015; *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 397-98, 90 S.Ct. 1772, 1785 (1970). Instead, petitioner relies on the proposition that permitting the States to be excluded from the imposition of prejudgment interest creates incentives contrary to those intended by Congress under the Debt Collection Act.

The legislative history is silent on the intent of Congress when passing § 3701(c). *West Virginia*, 479 U.S. at 312 n.6, 107 S.Ct. at 707 n.6; *State of Texas*, 951 F.2d at 650. Petitioner argues that exempting prejudgment interest for the States creates a perverse incentive with regard to the overall Congressional purpose of the Debt Collection Act. While it seems clear that the overall purpose of the Act is the improvement of the collection of claims owed to the federal government, the express exemption from §§ 3716 and 3717 for the States contained in § 3701(c) does not create a perverse incentive. First, the legislative history is silent with regard to Congress' perception of and intent to solve claim collection problems with the States;[5] the clear focus of Congress was on private debtors, not the States. E.g., Senate Report No. 97-378, U.S. Code Congressional and Administrative News, 97th Congress, 2nd Session, Vol. 4, p.

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[5] Section 3701(c) also exempts federal agencies and local government units. There is no legislative history indicating any perceived problem in collecting debts from any of these governmental entities.

3379 (1982) ("The $25 billion in delinquencies consists of $13.2 billion in unpaid taxes, $7.7 billion in overdue loans, and the remainder for overdue interest and overpayments to program beneficiaries.") Hence it is not perverse that Congress would exempt the States from two of the harsher collection measures of the Act.

Second, the imposition of strict liability on the States for direct mail delivery losses in the U.S. Postal Service over tolerance levels was the result of the secretary's decision to grant a unilateral action. The waiver of this strict liability is completely discretionary with the Secretary. The statute further provides that the States must resort first to administrative appeals of this discretionary action by the Secretary. There is no effective final judicial review of these discretionary acts by the Secretary. *State of Texas*, 951 F.2d at 648-49. To impose prejudgment interest on the States for the time period spent waiting for a final administrative determination is inequitable; delays in any final decision are just as likely to arise from the adversarial efforts of the USDA as from the States, and delays may also arise independently from within the administrative review process. Congress could well have determined that prejudgment interest was not equitable under these circumstances.

Third, many federal agencies have program offsets available to them to collect a claim against a State. The Debt Collection Act itself evidences such a provision, § 3714, that expressly provides for offsets against the States under certain circumstances.[6] Nonetheless, petitioner argues that

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[6] Congress exempted the States from the general administrative setoff provisions in § 3716. Yet in § 3714 there is an express provision for setoffs against the States in

because some statutes do not provide for setoff authority,[7] this remedy would not be available universally in the absence of the ability to impose prejudgment interest. The important point concerning administrative offsets, however, is that they are an option Congress knows it has available to utilize when it deems appropriate.

Furthermore, the case at bar does not involve a misuse of government funds in violation of statutory purpose. E.g., *Bell v. New Jersey*, 461 U.S. 773, 103 S.Ct. 2187 (1983); *Riles v. Bennett*, 831 F.2d 875 (9th Cir. 1987) (per curiam), *cert. denied*, 485 U.S. 988 (1988). In those latter cases federal monies are indeed mis-allocated, and hence the time value of money is a necessary element of full compensation. *West Virginia*, 479 U.S. at 311, 107 S.Ct. at 706; *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 654-55, 103 S.Ct. 2058, 2062-63 (1983). In contrast, the action by the Secretary makes Texas liable for losses due to third party actions that were not adequately curtailed by State and Federal law enforcement. Texas did not spend Federal monies outside program parameters, and hence prejudgment interest is not necessary to make the Federal Government whole. There are no "fruits of the infringement" that need to be "disgorged" from Texas, and no windfalls have been granted. *Devex Corp.*, 461 U.S. at 654-55, 103 S.Ct. at 2062. It is hardly perverse for Congress to intend to avoid subjecting the States to

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the case of State default on stocks or bonds issued by the State and held in trust by the Federal Government.

[7] The Food Stamp Act does provide for administrative offsets. 7 U.S.C.A. §§ 2016(f), 2022(a).

unilateral penalties imposed on the States by the Secretary of Agriculture without judicial review.

It is in fact the petitioner's interpretation that is more circuitous and strained. In essence petitioner argues that the intent of Congress was to establish an elaborate debt collection regimen that includes the imposition of prejudgment interest, but to exempt expressly the States from several of these provisions in order that the States be exposed silently to the same liability of prejudgment interest pursuant to prior common law. Such an interpretation defies the plain meaning of the statute and is an ambiguous and devious *post hoc* imposition of a program liability on the States.

Section § 3717(g)(1) of the Debt Collection Act is further evidence that Congress meant to exercise its authority in determinations of whether prejudgment interest is merited for claims against the States. Section 3717(g)(1) provides that § 3717 does not apply "if a statute, regulation required by statute, loan agreement, or contract prohibits charging interest or assessing charges or explicitly fixes the interest or charges...." Petitioner is correct that, pursuant to § 3701(c), § 3717(g)(1) does not apply to claims against the States. However, the relevance of § 3717(g)(1) is that this section is yet another indication of the intent of Congress to permit itself to determine those circumstances where the imposition of prejudgment interest would be appropriate.[8] It is another indication that Congress has addressed the issue of prejudgment interest directly, and that it desires to balance the interests and equities involved as it sees fit.

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[8] This is in fact the *post hoc* explanation of § 3701(c) given by the amendment's sponsor, Senator Percy. See *State of Texas*, 951 F.2d at 649-50.

Moreover, Congress has on several occasions expressly imposed prejudgment interest on the States, such as in the Medicaid Act, 42 U.S.C. § 1396b(d)(5), and in the Social Security Act, 42 U.S.C. § 418(j). Subsequent to the decision of the District Court in the case at bar, Congress amended the Food Stamp Act itself, effective November 1990, to expressly provide for prejudgment interest for violations of the quality control provisions of § 2025.[9] The most natural reading of this new provision is that it is a limited and express imposition of a new liability, rather than a redundant codification of common law. In other words, Congress knows how to impose prejudgment interest if it wants to.

The exemption of the States from the prejudgment interest provision in the comprehensive federal claim collection statute is clear. Given that Congress has addressed the issue, it is inappropriate for federal district courts to "supplement" the statute with remedies Congress expressly exempted. Moreover, the exemption is not perverse, and in fact is a quite plausible result of the typical balancing of interests that properly occurs in Congress.

III. BECAUSE THE FOOD STAMP ACT DOES NOT PROVIDE FOR PREJUDGMENT INTEREST ON DISCRETIONARY PENALTIES AWARDED AGAINST A STATE, AND THE DEBT COLLECTION ACT EXPRESSLY EXEMPTS THE STATES FROM PRE-JUDGMENT INTEREST, AWARDING PREJUDGMENT INTEREST AGAINS THE STATE OF TEXAS WOULD VIOLATE THE

[9] 7 U.S.C. § 2022.

PRINCIPLES OF *PENNHURST STATE SCHOOL & HOSPITAL V. HALDERMAN*.

The Fifth Circuit found that imposing prejudgment interest on the States as a result of a violation of the Food Stamp Act was a violation of the principles in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981). *State of Texas*, 951 F.2d at 651. Petitioner maintains nonetheless that this was error, that *Gallegos v. Lyng*, *supra*, was correctly decided, that enactment of the Debt Collection Act did not abrogate the common law remedy of prejudgment interest against States, and that the United States retains, pursuant to *Bell v. New Jersey*, 461 U.S. 773, 103 S.Ct. 2187 (1983), all implied remedies as part of the "backdrop" against which the States contracted for the Food Stamp Program. Petitioner's Brief at p. 13-14.

Respondent does not dispute that as a general rule the Federal Courts have the power to award appropriate relief for the violation of federal statutes, *Franklin v. Gwinnett County Public Schools*, __ U.S. __, 112 S.Ct. 1028, 1035 (1992), and that prior federal common law did provide for prejudgment interest against the States in certain circumstances. *West Virginia*, 479 U.S. at 312, 107 S.Ct. at 707. The applicability of *Gwinnett County* and *West Virginia* to the case *sub judice* is limited because of the punitive, non-contractual nature of the liability, the fact that the violation available in the Food Stamp Act is prejudgment interest noticed, and that the Debt Collection Act abrogated any prior common law exposing the States to prejudgment interest.

The Secretary's unilateral actions denied Texas the ability to "voluntarily and knowingly accept[] the terms of the 'contract.'" *Pennhurst*, 451 U.S. at 17, 101 S.Ct. at 1540. *State of Texas*, 951 F.2d at 651; *Perales v. United States*, 598 F.Supp.

19 (S.D.N.Y. 1984), *aff'd*, 751 F.2d 95 (2nd Cir. 1984)(per curiam); *State of Arkansas by Scott v. Block*, 825 F.2d 1254, 1258 n.7 (8th Cir. 1987), *reh'g and reh'g en banc denied*; *Commonwealth of Penn*, 781 F.2d at 342 n.13. Because the Food Stamp Act does not expressly provide for this liability, the Fifth Circuit found that any such additional unbargained-for liability would not conform to the contractual nature of Spending Clause statutes such as the Food Stamp Act. *State of Texas*, 951 F.2d at 651.

The *Gallegos* Court, however, held that the imposition of prejudgment interest was not a new condition or obligation of program participation, but simply a "remed[y] available against a noncomplying State." *Gallegos v. Lyng*, 891 F.2d at 800, quoting *Bell v. New Jersey*, 461 U.S. 773, 103 S.Ct. 2187 (1983). The *Gallegos* Court, relying further on *West Virginia*, *supra*, applied a commercial debt analogy to this unilateral imposition of liability and interest, and determined that prejudgment interest was an "element of compensation" that was "commonly awarded to the nonbreaching party." *Gallegos v. Lyng*, 891 F.2d at 800. The reasoning of the *Gallegos* Court is wrong for several reasons.

First, this Court's holding in *West Virginia* is inapposite to the case at bar because, contrary to the situation in that case, the contract in effect between the State of Texas and the U.S. Department of Agriculture when the liabilities at issue were created was entered into after October 25, 1982, and consequently is subject to the Debt Collection Act. Second, the enactment of the Debt Collection Act abrogated the prior common law remedy of prejudgment interest discussed in *West Virginia*. Third, Congress expressly enumerated the remedies available to the United States in the Debt Collection Act, thereby removing the presumption of all available remedies. *Gwinnett County*, __ U.S. at __, 112

S.Ct. at 1035-36 n.6. Fourth, as discussed in Section I, *supra*, the liability for direct mail delivery losses is punitive in character; punitive damages are not an element of complete compensation, and are not required to make a party whole. The *Gallegos* Court's reliance on *Riles v. Bennett*, *supra*, is misplaced for this very reason; *Riles* is an instance of mis-use of federal program monies, and hence prejudgment interest is a proper element of full compensation.

Moreover, the imposition of implied remedies is limited by *Pennhurst* where the alleged violation is unintentional. *Pennhurst*, 451 U.S. at 28-29, 101 S.Ct. at 1545-46. "The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award." *Gwinnett County*, __ U.S. at __, 112 S.Ct. at 1037. The strict liability imposed upon the State of Texas by the Secretary was for the actions of third parties over whom, as employees of the U.S. Postal Service, the State of Texas had no control.

In sum, any unilateral imposition of punitive damages liability and concomitant prejudgment interest without judicial review must conflict with the holding in *Pennhurst* that implied remedies are limited under Spending Power statutes.

IV. THE FIFTH CIRCUIT WAS CORRECT IN ITS DECISION NOT TO DEFER TO THE UNITED STATES DEPARTMENT OF JUSTICE AND THE GENERAL ACCOUNTING OFFICE IN THEIR INTERPRETATION OF § 3701(C) OF THE DEBT COLLECTION ACT.

Petitioner cites to several interpretations of the Debt Collection Act by the General Accounting Office (GAO) and the Department of Justice (DOJ) that support its contention

that the Debt Collection Act permits the imposition of prejudgment interest on the States. Petitioner's brief at pp.11-12. Upon examination the Fifth Circuit found these legal opinions of the GAO and the DOJ to be unpersuasive and lacking precedent. *State of Texas*, 951 F.2d at 651. Petitioner, however, argues that the Court of Appeals was wrong because it failed to accord the proper deference to the statutory interpretation of the agencies charged with applying the Act. Because this principle applies more appropriately to interpretations of policy issues and not of questions of law, the Fifth Circuit was correct in not deferring to the agencies' construction of § 3701(c) and the intent of Congress.

Federal courts are charged with both the authority and the responsibility to correct errors in law made by federal agencies. *SEC v. Chenery Corp.*, 318 U.S. 80, 94, 63 S.Ct. 454, 462 (1943); *Florida Dept. of Labor v. U.S. Dept. of Labor*, 893 F.2d 1319, 1321-22 (11th Cir. 1990). Judicial deference to agency statutory interpretations is, as Petitioner acknowledges, required only where the interpretation is a reasonable one. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 2782-83 (1984); Petitioner's Brief at pp. 12-13. Nevertheless, "[i]f the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.*, at 842-43, 104 S.Ct. at 2781. Since the Fifth Circuit held that Congress expressly exempted the States from prejudgment interest and did intend to abrogate the common law, the Court of Appeals was not required to adopt an agency interpretation that it found unreasonable. See *Commonwealth of Penn*, 781 F.2d at 342 ("Because the Act's language is clear, we will not defer to the administrators who construe it differently."). The Federal Courts are not required to "allow

misconceptions in law that arise during the agency decision-making process to go unchecked," *Florida Dept. of Labor*, 893 F.2d at 1322, nor remand for further agency determinations where the evidence shows that further agency deliberation would be futile. *Id.*, at 1324.

CONCLUSION

Respondent respectfully requests that this Court deny Petitioner's Writ of Certiorari to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Deputy Attorney General

JORGE VEGA, Chief
General Litigation Division

JAMES C. TODD
Assistant Attorney General
Appellate Division
P.O. Box 12548, Capitol Station
Austin, TX 78711-2548
COUNSEL OF RECORD

EDWIN N. HORNE
Assistant Attorney General
General Litigation Division
OF COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent on this the 25th day of June, 1992, to:

Kenneth W. Starr (Certified Mail)
William Kanter
Bruce G. Forrest
Department of Justice
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530

Roxanne McKee (Hand Delivery)
816 Congress Ave.
Suite 650
Austin, TX 78701

John Koch (AirBorne Express)
Office of General Counsel
U.S. Dept. of Agriculture
Room 2304 South Building
12th St. & Independence Ave. S.W.
Washington, D.C. 20250-1400

JAMES C. TODD
Assistant Attorney General

APPENDIX A

ADDITIONAL STATUTES AND REGULATIONS INVOLVED

1. 7 U.S.C. § 2016(f). State issuance liability.

Notwithstanding any other provision of this chapter, the State agency shall be strictly liable to the Secretary for any financial losses involved in the acceptance, storage and issuance of coupons,..., except that in the case of losses resulting from the issuance and replacement of authorizations for coupons and allotments which are sent through the mail, the State agency shall be liable to the Secretary to the extent prescribed in the regulations promulgated by the Secretary.

2. 7 C.F.R. § 276.1 Responsibilities and Rights.

(a) Responsibilities. (1) State agencies shall be responsible for establishing and maintaining secure control over coupons and cash for which the regulations designate them accountable. Except as otherwise provided in these regulations, any shortages or losses of coupons and cash shall strictly be a State agency liability and the State agency shall pay to FNS, upon demand, the amount of the lost or stolen coupons or cash, regardless of the circumstances.

3. 7 C.F.R. § 276.2 State agency liabilities.

(a) General provisions. Notwithstanding any other provision of this subchapter, State agencies shall be responsible to FNS for any financial losses involved in the

acceptance, storage and issuance of coupons. ....State agencies shall pay to FNS, upon demand, the amount of any such losses.

....

(b)(4) A State agency shall be held strictly liable for mail issuance losses that are in excess of the tolerance level that corresponds to the preselected reporting unit.

....